Supreme Court, U. S.
FILED
JUN 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1713

JOSEPH P. KENDALL,
Petitioner,

v.

BETHLEHEM STEEL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HARRY GOLDMAN, JR.
1605 One South Calvert Bldg.
Baltimore, Maryland 21202
Attorney for Petitioner

The Paul M. Harrod Company, Baltimore, Maryland 21234

INDEX

TABLE OF CONTENTS

Page

Opinions Below 2
Jurisdiction 2
Constitutional and Statutory Provisions Involved 2
Questions Presented 3
Statement of the Case 4
Reasons for Granting Writ 12
Conclusion 16

TABLE OF CITATIONS

Cases

American Mutual Insurance Co. of Boston v. Jones,
(CA, DC), 426 F.2d 1263, 138 U.S. App. D.C. 269. . 13
American Stevedores v. Salzano,
(CA 2) 538 F.2d 93, 935, 936 15
Appalachian Power Co. v. FPC,
328 F.2d 237, 240, (CA 4), cert. den.,
379 U.S. 829, 85 S. Ct. 59 16
Art National Manufacturer's Distributing Co.
v. F.T.C., (CA 2), 298 F.2d 476, 477 16
California Ship Service Co. v. Pillsbury,
(CA 9), 176 F.2d 873 12
Estate of MacCrowe v. Comm'r,
(CA 4), 264 F.2d 621, 623 16
Evening Star v. Kemp, (D.C. Cir.)
533 F.2d 1224, 1227 15
Friend v. Britten, (D.C., Cir.),
220 F.2d 820, 821 15
Gamble v. Skogmo, Inc., et al. v. F.T.C.,
(CA 8) 211 F.2d 106 16

Page

Lumbermens Mutual Casualty Co. v. O'Keefe,
(CA 2), 217 F.2d 720 12
O'Keefe v. Smith, 380 U.S. 359, 362 12,14
Overton Park v. Volpe, 401 U.S. 416 15
Owens v. Traynor, 274 F. Supp. 770, D.C. Md. 1966,
Aff'd 396 F.2d 783, (CA 4, 1968), cert den.,
393 U.S. 962 7,12
Pillsbury v. United Engineering Co.,
72 S. Ct. 223, 342 U.S. 197 12
Portland Stevedoring Co. v. Johnson,
(CA 9), 442 F.2d 411 13
Southern Steamship v. Norton,
(CA 3), 101 F.2d 825 12
Travellers Ins. Co. v. McClellan,
(CA 2), 288 F.2d 250) 12
Twin Harbor v. Marshall, (CA 9),
103 F.2d 513, 515 13
United Engineering Co. v. Pillsbury,
92 F. Supp. 898, 187 F.2d 987,
aff'd, 342 U.S. 197, 72 S. Ct. 223 13
United States v. Utah Construction Co.,
384 U.S. 394, 421, 86 S. Ct. 1545, 1559 15
Universal Camera Corp. v. N.L.R.B.,
340 U.S. 474, 488 3,15
Van Teslaar v. Bender, 365 F. Supp. 1007,
(U.S., D.C., D.C. Md., Miller, J.) 16
Voris v. Eikel, 74 S. Ct. 88,
346 U.S. 328 12
Welch v. Leavey, 397 F.2d 189 (CA 5, 1968),
Cert. Den., 393 U.S. 1049 (1969) 12

Page

Statutes

United States Constitution
Fifth Amendment 2,10
Longshoremen's and Harborworkers' Compensation Act,
33 U.S.C. 901, *et seq.* 2
Section 901 2
Section 902 (a) 15
Section 902 (10) 4,5,13,14
Section 908 (c) (1-21) 5,12,13,14,15
Section 908 (h) 3,5,6,7,8,12
Section 908 (21) 4
Section 920 (a) 3
Section 921 (v) 8
Section 921 (c) 4

Textbooks

2 Davis on *Administrative Law Treatise*
Section 11.18, P. 1133 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO.

JOSEPH P. KENDALL,
Petitioner,

v.

BETHLEHEM STEEL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Joseph P. Kendall, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the

United States Court of Appeals for the Fourth Circuit entered in the above-entitled case, on January 26, 1977.

OPINIONS BELOW

The Opinion of The Circuit Court is unreported. The case Number is 76–1454 and it is printed in the Appendix hereto, Page A. 3 . The Decisions of the United States Department of Labor Benefits Review Board and the Decisions of the Administrative Law Judges are printed in the Appendix, at Pages A.5 – A.40.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 26, 1977, and, on March 4, 1977, an Order was entered denying a timely Petition for Re-Hearing. (A. 2). The jurisdiction of the Supreme Court is invoked under 28 U.S.C., 1254 (1) and 28 U.S.C. 2350 (a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This petition involves the due process clause of the U.S. Constitution Fifth Amendment, which provides that no person shall be "... deprived of life, liberty or property without due process of law;", and the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. 901, *et. seq.*, relevant portions of which are contained in the Appendix accompanying this petition.

QUESTIONS PRESENTED

1. Did not the lower Court fail to apply the standard of review prescribed by this Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, and reverse the Benefits Review Board's final decision, as unsupported by substantial evidence on the record considered as a whole, where the Board concluded in its first decision that a denial of compensation could not be founded on the Claimant's post-injury earnings and work activities, under Section 908 (h) of the Longshoremen's and Harbor Worker's Compensation Act, and on the self-same record, in its second decision, concluded to the contrary.

2. Was not the Benefits Review Board's initial finding and conclusion that Kendall's post-injury earnings and work activities did not fairly and reasonably represent his wage-earning capacity binding on the Board, under the principle of *res judicata*.

3. Did not the lower Court err in failing to order the Benefits Review Board to grant compensation, upon the presumption that the claim falls within the Act, pursuant to Section 920 (a) and, construing the Act in accord with its humanitarian purpose, resolve factual doubts in favor of the Claimant, and in a way to avoid harsh and incongruous results.

4. Were not the Claimant's due process rights violated by the failure of the Board to order a hearing *de novo*, where, after remand, a second administrative law judge, substituted for the first, without a hearing, retried the entire case, resolved credibility issues and conflicts in testimony

and, without notice, exceeded the order of remand and contradicted the Board's findings and conclusions in its remand decision.

5. Is not the decision of the Court below violative of Sections 902 (10) and Section 908 (21) of the Longshoremen's and Harbor Workers' Compensation Act, by holding, in effect, that so long as Claimant could return to his job as a rigger, it is immaterial for purposes of determining permanent partial disability, that he is physically unable to do the higher paying job of crane operator by reason of his compensable injury.

STATEMENT OF THE CASE

Pursuant to 33 U.S.C. 921 (c), the Court below affirmed an Order of the United States Department of Labor Benefits Review Board, which denied claimant's claim for permanent partial disability, under the Longshoremen's and Harbor Worker's Compensation Act of 1972, 33 U.S.C. 901, et seq., hereinafter sometimes referred to as "The Act." In the second of two Decisions, the Board affirmed a Decision and Order of an Administrative Law Judge, concluding that claimant suffered no economic disability as a result of his back injury, resultant disc surgery and a conceded disability of at least 15%.

The claimant suffered a compensable injury to his back, while working for Bethlehem Steel Corporation on September 27, 1969. After claimant sustained nine months of temporary total disability, including recovery from operative removal of a ruptured intervertebral disc, a Federal Deputy Commissioner recommended a permanent partial

disability award based on a 20% loss of wage earning capacity, on July 14, 1973, pursuant to Section 908 (c) (21) of The Act.

Bethlehem refused to accept this recommendation, and the case was tried by Administrative Law Judge Benn, on December 5, 1973, who rejected claimant's claim in a written Decision and Order (A.35). Benn's legal conclusion was that the claimant suffered no "disability" within the meaning of Section 908 (c) (21) Section 902 (10) of the Act, in the sense of loss of wage-earning capacity, because claimant's income increased, after his re-employment and "fairly represented" the claimant's post-injury "wage-earning capacity" under Section 908 (h). In back injury cases, under Section 8 (c) (21) of the Act, compensation Awards are made, based on the difference between claimant's average weekly wages, prior to the injury and "his wage earning capacity thereafter in the same employment or otherwise." Vital to this Petition is the following Section of the Act, which legally determine the determination of "wage-earning capacity," following injury in this class of cases, under Section 908 (c) (21).

This is determined by Section 908 (h) of the Act and by the proviso contained therein, viz:

> "The wage-earning capacity of the injured employee in cases of partial disability under Sub-divisions (c) (21) of this Section . . . shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* that if the employee has no actual earnings, or his actual earnings do not fairly and reasonably represent his

> wage-earning capacity (the Administrative Law Judge) may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard for the nature of his injury, the degree of physical impairments, his usual employment and any other factors or circumstances in the case, which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future."

Since, under Administrative Law Judge Benn's Decision, he found and concluded under Section 908 (h), that Kendall's actual earnings, post-injury, fairly and reasonably represented his wage-earning capacity, he did not fix Kendall's wage-earning capacity under the proviso of Section 908 (h).

Upon Benn's denial of compensation, based on this finding and conclusion, the Benefits Review Board reversed his Decision on Appeal, and remanded. The Board reversed Benn's finding and conclusion that Kendall's post-injury earnings fairly and reasonably represented his post-injury wage-earning capacity. The Board said: (A.32)

> "It is not disputed that petitioner sustained a permanent, 15 to 20% physical impairment of his lower back. In addition, the Record indicates that upon his return to work at the Sparrows Point Yard at Bethlehem Steel Corporation, petitioner did not perform the same arduous work he had undertaken prior to his injury. The position he accepted as groundsman on the pier is acknowledged to involve lighter work than the usual duties he had performed before the injury. Under the circumstances presented by this case,

> the Board feels that a finding should have been made as to how the petitioner's physical impairment might affect his earning capacity as it might naturally extend into the future. See Section 8 (h) of the Act, 33 U.S.C., Section 908 (h). It has been held that the possibility of future disablement, greater than that presently suffered is a factor that the Act directs to be taken into consideration, in determining wage-earning capacity . . . .
>
> In determining the possible future economic effects of petitioner's physical impairment, the wage-earning capacity may be tested by an assumption that his present employer would dispense with his services, requiring him to secure employment in the competitive labor market . . . The effect of petitioner's impairment on his ability to secure gainful employment in the open labor market, at the same wage that he had been earning prior to his accident should be determined. A claimant is entitled to a liberal construction of the Act and doubt should be resolved in his favor.

The Administrative Law Judge relied heavily on *Owens v. Traynor*, (274 F. Supp. 770 (D.C. Md. 1966), Aff'd 396 F.2d 783 (CA 4, 1968). It should be noted that, although in that case, the Court of Appeals affirmed the finding of no loss of wage-earning capacity, the panel recognized that the claimant had performed relatively sedentary engineering duties. In the case before the Board, the claimant's duties involve the arduous labor of a rigger. The effects of physical impairment on wage-earning capacity may be quite different in these two situations.

> This case is remanded to the Administrative Law Judge for re-evaluation of the petitioner's wage-earning capacity, considering the type of work petitioner performed prior to his injury, the possible effect of his physical impairment on his ability to continue to do such heavy work, and his prospects if he were forced to seek similar employment on the open labor market."

The Board, by its appellate powers, prescribed by Section 921 (b), (3), (4), thus reversed the findings and conclusions of the Administrative Law Judge that claimant performed his work well after his return to work following his injury, and that his post-injury earnings fairly and reasonably represented his wage-earning capacity, under 908 (h).

After Remand, Benn retired and the case was re-assigned, twice, finally to Administrative Law Judge George A. Fath.

Fath went entirely beyond the scope of Remand. In denying the claim for the second time, he reinstated the findings of Benn, which had been set aside by the Benefits Review Board. Without holding a hearing, he reviewed the entire proceeding and made detailed findings of fact thereon, uniformly resolving against the claimant all matters of credibility or inferences to be drawn therefrom. In a detailed Decision, he found the claimant's Petition for Review which had been already considered and granted by the Board, and which resulted in the Remand, "unreliable" "inaccurate" and "misleading". (This, after the Board had exercised its appellate power, under Section 921 (b) (3), which provides that "The Board's Orders shall be based upon the hearing record . . . ") Fath declared " . . . generally,

as a whole, the case is lacking in candor." He ignored all admissions by Bethlehem Steel Corporation's witnesses, including the critical one of its physician-employee to the effect that if the claimant were to apply to him as a new employee, he would not hire him on an unrestricted basis, without a waiver.[1] He did not apply the "Open Market" standard The Board had ordered Benn to apply on Remand.

On Claimant's second Appeal to the Benefits Review Board, the Fath Decision was affirmed. The Board held that the Fath Decision did not exceed the scope of the Remand Order, that Administrative Law Judge Fath, rather than the Board, could make credibility findings on the Record, if Administrative Law Judge Benn was unavailable to the Agency. The Board blinked Fath's *failure* to apply the "open market" standard which the Administrative Law Judge had been directed to apply on Remand, saying that it was only a useful guide. It further affirmed Fath's finding and conclusion that Kendall's real motive in turning down the higher paid work of a crane operator after his injury was because he was gregarious and did not want to stay in the crane for eight hours, even though Kendall and his doctor had both testified, without contradiction, that he was unable to climb the ladder to the crane, or sit in it for eight hours. (Nowhere in the entire record is there any evidence to support this Fath finding and conclusion, nor to contradict the testimony of Kendall and his operating, Board Certified neurosurgeon, that he was unable to do the

---

[1] A waiver may be required of employees who have been previously injured, as a condition to their being hired initially under Maryland Workmen's Compensation Law, *Michie Code, Article 101*, Section 36 (b).

climbing involved in the crane operator job.) The Board said "The Administrative Law Judge, charged with the *determinations of credibility*, chose not to believe that physical inability was the reason . . . " (Emphasis supplied). It should be borne in mind that Fath held no hearing and saw no witnesses; (Petitioner maintains that this, under the circumstances was a denial of his due process rights, U. S. Constitution, Fifth Amendment.)

In place of its previous finding and conclusion that, "In addition, the record indicates that upon his return to work . . . petitioner did not perform the same arduous work he had undertaken prior to his injury. The position he accepted as a groundsman on the pier is acknowledged to involve lighter work than the usual duties he had performed before the injury", the Board found in its second Decision, in affirming Fath, "employer's doctor, certified in occupational medicine, testified that claimant is able to perform the work of a rigger, and that claimant *was not given any light-duty work in recognition of a disability on his return to work after the injury.*" Thus, the Board contradicted and reversed its own findings of fact and conclusions of law in favor of those of its subordinate Administrative Law Judge, whose findings, like the Board's findings, were based only on the Record, without an opportunity to see and hear the witnesses testify.

The Board went outside the Record to conclude that the fact that, if claimant were to be considered for hiring as a new employee, after having the company physician examine him, he would not be hired on an unrestricted basis, without a waiver, was not "conclusive" because "many Union contracts do not permit preemployment physical examinations." This make-weight is not only

outside the Record, but Kendall submitted to two examinations by the employers physician after he was re-employed, and the Plant physician did not demur when asked to posit such an examination in determining whether Kendall would be hired on an open-market basis, when claimant's attorney cross-examined him at the hearing.

The United States Court of Appeals for the Fourth Circuit's entire *Per Curiam* Opinion is set forth, as follows:

> "Joseph P. Kendall appeals the Decision of the Benefits Review Board denying his claim for permanent partial disability under the Longshoremen's and Harborworkers' Compensation Act of 1972, 33 U.S.C. 901.
>
> Kendall injured his back while working as a rigger. After recuperating from an operation on his back, he returned to work on the pier. He became a Union steward. Then he successfully campaigned for the job of Union president. After being Union president, Kendall became a Local Representative of the AFL–CIO to the Baltimore Area Council on Alcoholism.
>
> We find there is substantial evidence on the whole Record to support the Board's conclusion that Kendall could return to his job as a Rigger, without a loss in his earning capacity if he should lose his job as representative to the Council on Alcoholism. There is evidence that, while working on the graving dock, after his return to work, Kendall performed tasks similar to those he performed prior to the injury. His earnings since the injury have always exceeded his earnings before the injury. *Affirmed.*

REASONS FOR GRANTING WRIT

The Longshoremen's and Harborworkers' Act is, of course, national in scope, being based on the admiralty jurisdiction power contained in The Federal Constitution. The Act is also of a remedial humanitarian nature and should be construed liberally to effectuate its purpose and, "in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 74 S.Ct. 88, 346 U.S. 328; *Pillsbury v. United Engineering Co.*, 72 S.Ct. 223, 342 U.S. 197; *O'Keefe v. Smith*, 380 U.S. 359.

However, in the class of cases at bar, i.e. back injuries or non-scheduled injuries under Section 908 (c) (21), where loss of wage-earning capacity must be fixed under 8 (h) and its proviso, as opposed to scheduled-member cases, where the compensation for loss of a member is numerically fixed in the Statute, under Section 8 (c) (1) through (20), the Act is not administered uniformly nationally throughout the Federal Appellate Circuits and the result, as here, is "harsh and incongruous".

In the Fourth and Fifth Circuits, cases involving proved and admitted anatomical disability are uncompensated, because in practice higher post-injury earnings result *ipso facto* in denial of benefits, in those Circuits. e.g., *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1967, Thomsen, J., aff'd) 396 F.2d 783 (CA 4, 1968), *cert. den.*, 393 U.S. 962; *Welch v. Leavey*, 397 F.2d 189 (CA 5, 1968), *cert. den.*, 393 U.S. 1049 (1969). The rule in other Federal Circuits is to the contrary. *Southern Steamship v. Norton*, (CA 3), 101 F.2d 825; *California Ship Service Co. v. Pillsbury*, (CA 9), 176 F.2d 783; *Travellers Insurance Company v. McClellan* (CA 2), 288 F.2d 250; *Lumbermen's*

Mutual Casualty Co. v. O'Keefe, (CA 2), 217 F.2d 720; *Twin Harbor v. Marshall*, (CA 9), 103 F.2d 513, 515, *United Engineering Co. v. Pillsbury*, 92 F. Supp. 898, 187 F.2d 987, Aff'd, 342 U.S. 197, 72 S.Ct. 223; *Portland Stevedoring Co. v. Johnson*, (CA 9), 442 F.2d 411, *American Mut. Ins. Co. of Boston v. Jones*, (A.A., D.C.) 426 F.2d 1263, 138 U.S. App. D.C. 269.

This Court should resolve the conflict between the Fourth and Fifth Circuits, on the one hand and, the Second, Third, Ninth, and District of Columbia Circuits on the other, by explicitly declaring the law to be as set forth in Sections 902 (10) and 908 (c) (21), as construed in the *Norton* and *Twin Harbor* cases, supra, i.e. not only are increased earnings post-injury not the test, but so long as the compensable injury impairs claimant's physical ability to work at any occupation for which he was qualified before injury, a loss of wage-earning capacity follows and compensation is granted. Thus, in *Norton* though claimant could earn the same amount both before and after injury as a trucker; his physical inability to stow in the hold, as he could before injury, required an award.

So, too, in *Marshall*, claimant's remaining able to perform supervisory work at the same wage, did not prevent an award where general longshoreman's work was foreclosed by the injury. Obviously, as the *Marshall* Court said, if it held otherwise, the purpose of the Act could be defeated by the employer's promoting a claimant to sedentary but higher paid work after his injury so as to avoid an award, then firing the claimant after Limitations runs.

Here, claimant has persistently maintained that construing the Act literally as the Third and Ninth Circuits

did in *Norton* and *Marshall* will avoid this result. Claimant argues, as follows:

Section 902 (10) of The Act provides:

"Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or *any other employment.*" Section 908 (c) (21) states that claimant shall be compensated for the difference between his wages prior to injury and "his wage-earning capacity thereafter in the same employment *or otherwise.*"

"Any other employment" and "same employment *or otherwise*" means any other employment of which claimant was capable before injury – not as The Fourth Circuit implies in this case – any other employment the claimant can find post-injury. The latter construction defeats the purpose of the Statute, as *Norton* and *Marshall* hold. Here, claimant is deprived of an Award, because of his earnings increased from non-strenuous Union employment, first as a shop steward, a position he held at the graving dock and, afterward, as Union president and representative to the Baltimore Area Alcoholism Council. The loss of the crane operator position because of claimant's disability, claimant contends, was erroneously ignored on the plainly "irrational"[2] basis that claimant refused it because he was "gregarious" and even though both claimant and his physician testified, without contradiction, that he was physically unable to perform it. Yet, this is the very "other

[2] This Court has held that fact findings under the Act cannot stand, if they are "irrational". *O'Keefe v. Smith*, 380 U.S. 359, 362.

employment", within the meaning of Section 902 (10) and Section 908 (c) (21), for which claimant is now disabled and for which a compensation award is compelled by the Statute under The *Norton* and *Marshall* rule. This Court should determine the legal construction of the Statute and resolve the conflict between the Federal Appellate Circuits, based on the two differeing views.

The interpretation of The Act by the Fourth Circuit Court is also at odds with the statutory presumption that the claimant's claim falls within the Act, Section 920 (a), *cf. American Stevedores v. Salzano*, (CA 2), 538 F.2d 93, 935, 936 and the "settled rule that the Act is to be construed with a view toward its beneficient purposes. Doubts, including the factual, are to be resolved in favor of the employee . . ." *Evening Star v. Kemp*, (D.C. Cir.) 533 F.2d 1224, 1227; *Friend v. Britten*, (D.C., Cir.), 220 F.2d 820, 821.

Petitioner urges that since the Board found and concluded in Its First Decision, that Kendall's post-injury earnings and work activities were legally insufficient to base a denial of compensation, when the Board reversed that finding in Its Second Decision, It not only violated the precept of *res judicata, U.S. v. Utah Construction Co.*, 384 U.S. 394, 421, 86 S. Ct. 1545, 1559, but deprived its final Decision of support by substantial evidence on the Record, as a whole, *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, *Overton Park v. Volpe*, 401 U.S. 416.

The *In camera* findings of the second Administrative Law Judge Fath cannot, petitioner submits, strengthen the final result. These resolved credibility findings without demeaner observation in open hearing, where no Record

basis exists. Since claimant had no notice a re-trial would occur because of the limited scope of the Remand Order, (also violated), claimant had no opportunity to request, further Hearing. Claimant's due process rights, he submits, were trampled by this Kangaroo Court proceeding. See 2, *Davis Administrative Law Treatise*, Section 11.18, P. 113, *Appalachian Power Company v. F.P.C.*, 328 F.2d 237, 240, *Cert. den.*, 379 U.S. 829, 85 S. Ct. 59; *Van Teslaar v. Bender*, 365 F. Supp. 1007, (U.S.D.C., D.C. Md., Miller, J.) *Estate of MacCrowe v. Comm'r*, (CA 4), 264 F.2d 621, 623; *Art National Manufacturer's Distributing Co. v. F.T.C.*, (CA 2), 298 F.2d 476, 477, *Gamble-Skogmo, Inc., et al. v. F.T.C.*, (CA 8), 211 F.2d 106.

CONCLUSION

If this Court intends to hold that an administrative agency may, in the same case, reach opposite conclusions from the same record and still pass the substantial evidence test, by the independent Court canvass of the record required by *Universal Camera, supra*, the Court should say so explicitly.

If the Court means to hold that so long as an injured claimant maintains or acquires any trade or occupation that would yield his pre-injury earnings he has suffered no disability and is entitled to no compensation, no matter how much he is crippled from engaging in other trades for which he was fit, the Court should say so.

Finally, if claimant must brook a trial by one Hearing Examiner who The Agency says misconstrued the evidence, and misapplied the law, and a second Hearing Examiner

who on Remand violates and ignores The Agency's Findings, decides the case without hearing, resolving all facts against claimant and rejecting all inferences favorable to claimant, if all this constitutes due process, and conforms with this Court's precedents[3], this Court should say so.

All of the above issues were tendered for Decision to the Court below, and not decided although they are material.

Petitioner prays, for the foregoing reasons, that certiorari issue to secure uniformity of interpretation of the Act, nationally, and to correct the denial of due process in this case.

Respectfully submitted,

Harry Goldman Jr.

HARRY GOLDMAN, JR.
Attorney for Joseph P. Kendall, Petitioner

---

[3] *Voris v. Eikel, supra; O'Keefe v. Smith, supra.*